

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

JANE DOE and JOHN DOE, . Civil Action No. 1:04cv1361
 .
 Plaintiffs, .
 .
 vs. . Alexandria, Virginia
 . January 28, 2005
 YUSUF ABDI ALI, . 10:00 a.m.
 .
 Defendant. .
 .

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: ROBERT R. VIETH, ESQ.
Cooley Godward LLP
One Freedom Square
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Reston, VA 20190-5656

FOR THE DEFENDANT: JOSEPH PETER DRENNAN, ESQ.
218 North Lee Street, Third Floor
Alexandria, VA 22314-2631

ALSO PRESENT: YUSUF ABDI ALI

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR
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P R O C E E D I N G S

1
2 THE CLERK: Civil Action 2004-1361, Jane Doe, et al. v.
3 Yusuf Abdi Ali. Counsel, please note your appearance for the
4 record.

5 A VOICE: Your Honor, we didn't hear the case.

6 THE COURT: I'm sorry?

7 A VOICE: We didn't hear the case name, Your Honor.

8 THE COURT: It was Jane Doe v. Yusuf Abdi Ali, 04-1361.

9 A VOICE: Thank you, Your Honor. I'm sorry.

10 THE COURT: All right, counsel, note your appearance for
11 the record.

12 MR. VIETH: Good morning, Your Honor. Robert Veith from
13 Cooley Godward for plaintiffs.

14 THE COURT: All right.

15 MR. DRENNAN: Good morning, Your Honor. Joseph Peter
16 Drennan on behalf of the defendant, Yusuf Abdi Ali, who is present
17 before the Court.

18 THE COURT: All right. Now, there are two motions
19 pending before the Court. The first is the plaintiffs' motion to
20 proceed anonymously. The second is the defendant's motion to
21 dismiss claims of anonymous plaintiffs.

22 I'm not going to hear argument on the plaintiffs' motion
23 to proceed anonymously. I have apparently a similar case that
24 Mr. Vieth is also of counsel for the plaintiffs. I think the
25 appropriate -- given the nature of the allegations in this case

1 and the representations that I have no reason to look behind at
2 this point that the plaintiffs believe that they would be subject
3 to serious security problems in Somalia if their names were
4 publicly revealed, I am going to allow the plaintiffs to proceed
5 anonymously, with the caveat that their names will be revealed to
6 both defense counsel and the defendant under a strict protective
7 order that those names are not to be revealed beyond counsel for
8 the defendant without explicit permission from the Court.

9 This therefore will in no way restrict the ability of
10 the defendant to mount a defense and to conduct investigation, and
11 I think that's the proper way of balancing the appropriate
12 interests in this case. So that's consistent, as I recall,
13 Mr. Vieth, with what I did in your other case.

14 MR. VIETH: It is, Your Honor, and thank you.

15 THE COURT: All right. Mr. Drennan, do you understand
16 the parameters?

17 MR. DRENNAN: I do understand that we're so bound, Your
18 Honor. However, I do feel obliged to mention, of course, there's
19 no need for us, of course, to note exception to the ruling, but
20 respectfully, we do. But beyond that -- and we'll honor that
21 ruling.

22 However, the Court should know that there have been
23 antecedent proceedings before Judge Poretz involving an
24 inadvertent disclosure of Jane Doe's name in one paragraph of the
25 complaint. That complaint has since been sealed.

1 THE COURT: Correct.

2 MR. DRENNAN: However, I just want the record to reflect
3 that that name was known by my client, who was not bound by any
4 order at that time. He has not to my knowledge, you know,
5 indulged in much dissemination of the name. But that name was in
6 a public document up until last Friday.

7 THE COURT: I'm aware of that, and I can caution you,
8 because this affects the last case on my docket as well, that one
9 of the ongoing problems that counsel have, and fortunately, we're
10 not electronic yet in this district, but with electronic courts,
11 and that's the way of the future, it is a devastating problem when
12 these inadvertent mistakes are made because then it's potentially
13 out on the net, and you can't bring it back in.

14 But in any pleadings that you-all file with the court,
15 it's the burden -- and our local rule now requires it -- that
16 counsel have the obligation of ensuring that any attachments to
17 pleadings not contain personal identifiers, including, for
18 example, the entire social security number, names of children,
19 various other personal information that's in the local rule. That
20 applies whether a case is proceeding anonymously or not, but
21 particularly in this case, the burden is on counsel to
22 appropriately redact any documents that you're filing publicly.

23 And because of the Fourth Circuit's view about sealing
24 records in court, don't just think that because there's a piece of
25 sensitive information, the entire document must therefore be

1 sealed. You'll be required to file either as the only copy of the
2 court a redacted copy or a redacted copy for public dissemination
3 and an unredacted copy under seal for record of the court -- of
4 the case. But just be sensitive to that, especially with
5 attachments that you put to your pleadings.

6 MR. DRENNAN: I understand, Your Honor. One brief point
7 further to Your Honor's admonition, the record should also reflect
8 that co-counsel, not Mr. Vieth's firm, but co-counsel for the
9 plaintiffs did indeed post that initial iteration of the complaint
10 on the Internet, and it was on the Internet for three months,
11 until, until a couple of weeks ago.

12 THE COURT: All right. Well, that's the danger of that.

13 But I assume that plaintiff has not had any
14 repercussions from that, Mr. Vieth?

15 MR. VIETH: No, Your Honor.

16 THE COURT: All right.

17 MR. VIETH: That's correct. And, Your Honor, if I may,
18 one further follow-up, there is a third motion before the Court,
19 and I raise it now, and it's a motion for leave to file a first
20 amended complaint that corrects the problems that we've just
21 discussed. I do believe that's on Your Honor's docket today.
22 There's been no opposition.

23 THE COURT: Well, I'll tell you what: I think that was
24 before Judge Poretz, but the way to handle it is simply to file a
25 redacted version, unless you're trying to change something else.

1 MR. VIETH: No.

2 THE COURT: Just file the original complaint with
3 whatever the name is blacked out so it can't be seen. In other
4 words, that's how this should be handled rather than a first
5 amended complaint. You're simply filing a redacted version of the
6 original complaint.

7 MR. VIETH: Very well, Your Honor.

8 THE COURT: Unless you're trying to change something
9 more substantive than that.

10 MR. VIETH: No, no. We have filed it just to correct an
11 inadvertent disclosure, and Judge Poretz's chambers advised me
12 that that was before Your Honor.

13 THE COURT: Don't worry about it. I'm ruling on that
14 now.

15 MR. VIETH: Yes, Your Honor.

16 THE COURT: The relief you're getting is leave of Court
17 to substitute for the original complaint which is now under seal a
18 redacted version of that complaint.

19 MR. VIETH: Very well, Your Honor.

20 THE COURT: All right?

21 MR. VIETH: That's fine. We will do that, and I thank
22 you.

23 THE COURT: Thank you. All right.

24 Now, the second motion that's before the Court is the
25 defendant's motion to dismiss the claims of the plaintiffs, and

1 the defendant has raised various theories of defense, including
2 arguments about statute of limitations.

3 Mr. Drennan, let me ask you this: My understanding of
4 some of the statutes that are involved here is that there is a
5 ten-year statute of limitations and that the ten years runs from
6 the time the person would have entered the United States or at
7 least with one of these statutes, if the person had resided
8 continuously in a foreign nation where a similar cause of action
9 might be able to be raised.

10 Now, my understanding from the record is that the
11 defendant spent some time in Canada.

12 MR. DRENNAN: Two years, Your Honor.

13 THE COURT: Have you addressed at all the issue as to
14 whether a similar forum would have been available in Canada?

15 MR. DRENNAN: Well, Your Honor, we did not -- in terms
16 of our equitable tolling argument, just to, to clarify what may be
17 some ambiguities going back and forth in the pleadings here, we
18 agree that with regard to forum non conveniens, we have an
19 affirmative in terms of proving that another forum would have been
20 more convenient.

21 In terms of equitable tolling, our position is that
22 the -- having raised statute of limitations as an affirmative
23 defense, which we have by filing the motion to dismiss based on
24 such ground and by lodging an answer raising that as an
25 affirmative defense, that it's incumbent upon the defendant (sic)

1 to come forth and account as to why suit hasn't been filed for
2 such a long period of time.

3 Some of these actions date back -- alleged actions date
4 back over 20 years, i.e., to 1984, and we do concede in terms of
5 the equitable tolling analysis, just to collapse the copious
6 pleading that's gone back and forth, that equitable tolling would
7 apply until the regime fell. The regime fell in 1991, and on that
8 issue, we would note that although not clarified by the
9 plaintiffs, the regime fell right around this time in 1991,
10 January of 1991, and our position in our pleadings and here today
11 is that that is when equitable tolling ceased.

12 My client per his declaration which was filed with the
13 motion to dismiss accounts for all of his actions both antecedent
14 to -- in terms of his whereabouts, antecedent to the fall of the
15 regime and since the fall of the regime, and he has lived openly,
16 per his declaration -- and this has not been gain said by the
17 other side at all -- he's lived openly since 1991 either in Canada
18 for two years, in the United States for nine years and eight
19 months, and he was in Ethiopia for a period of two years in the
20 mid-'90s.

21 Although we really didn't develop to the fullest extent
22 that it could have perhaps been developed on the forum non
23 conveniens argument, on the equitable tolling argument, there's no
24 reason why on the, on the issues that are before the Court these
25 plaintiffs could not have brought this action in Canada during

1 those two years.

2 And this assertion by the plaintiffs that the statute
3 only applies during the period within which the defendant is
4 resident in the United States is premised on essentially two
5 cases: the Marcos decision out of the Ninth Circuit and there's
6 an Estate of Cabello, I believe, decision out of another
7 jurisdiction that seizes upon some material in the Senate report
8 that makes reference to presence in the United States as being the
9 calculus upon which the running of the statute ought to be
10 predicated. However, there's no Fourth Circuit authority on that
11 point.

12 And we respectfully submit to the Court that the Court
13 could take judicial notice that the courts in Canada are open and
14 that they have a common law system and that they have open access
15 to the courts just as we do, and if one tacks the two years that
16 Mr. Ali was in Canada on the nine years and eight months that he's
17 been in the United States, that carries it over the ten-year
18 threshold, and therefore, this action is stale and untimely and
19 not saved by equitable tolling.

20 And further, in regard to the issue of equitable
21 tolling, Your Honor, we looked very carefully at the documentary
22 evidence and the declaration of Mr. Ganzglass that was put before
23 the Court to rebut our, our argument with regard to limitations,
24 and Mr. Ganzglass very -- Mr. Ganzglass is a very well-known and
25 respected attorney who has a good deal of knowledge, historic

1 knowledge about Somalia, but Mr. Ganzglass in his affidavit only
2 admits to having been in Somaliland, the territory defined as
3 Somaliland, once in the 1990s, and he does not give any
4 unequivocal opinion as to this whole notion of how it was that
5 these defendants were so -- or plaintiffs, rather, were so
6 besieged by chaotic conditions there that they could not have
7 conducted their investigation and initiated their action sooner.

8 In fact, the various reports that have been filed before
9 the Court in this case and in the Samantar case reflect that the
10 notion of Somalia as a contiguous singular entity is something of
11 a misnomer, that since the early 1990s, i.e., shortly after the
12 fall of the Barre regime, Somaliland was created by the Isaaq clan
13 that these plaintiffs are reportedly members of, and there's no
14 indication that they were at any risk to their personal safety and
15 that they were able to -- or unable or precluded from
16 investigating their claims and prosecuting their claims. They
17 lived in a safe region of that country -- or what was a country.
18 It's a failed state now.

19 And in further regard to that point, Your Honor, it
20 bears mention that Mr. Ganzglass, there's no indication that he
21 ever talked to these plaintiffs. Our system of justice is based
22 on the individual, not the clan, and Mr. Ganzglass makes generic
23 references to members of the Isaaq clan and talks about unsafe
24 conditions in Mogadishu.

25 I would agree that if these plaintiffs lived in

1 Mogadishu, they would have a very credible equitable tolling claim
2 because Mogadishu is indeed beset by clan violence. The new
3 interim government that was just formed two months ago in Nairobi,
4 Kenya, after many years of efforts among these clans that have
5 been warring against each other -- indeed, my client participated
6 in those efforts in the mid-1990s -- even after those clans have
7 worked out all of their very deep and bitter conflicts amongst
8 each other, they're still working out arrangements with warring
9 clans and sub-clans in Mogadishu to be able to go back there in
10 order to take up the reins of government and try to establish a
11 government from whence there has not been a government for a
12 decade and a half.

13 And, Your Honor, in, in the -- in further regard to the
14 motion -- or the opposition to the motion to dismiss that's
15 premised on this equitable tolling argument, where is the
16 declaration from these plaintiffs that they personally couldn't
17 bring their lawsuit? Where is -- I don't mean to be persnickety
18 about this, but where is there an indication that Mr. Ganzglass
19 even read and studied the accusations that were made in the
20 lawsuit? His affidavit or his declaration does not state that.

21 THE COURT: All right. Let me hear from Mr. Vieth on
22 the issue of equitable tolling.

23 MR. VIETH: Your Honor, it is, it is our position that
24 we are here on a motion to dismiss in which the allegations of the
25 complaint must be taken as true. And to be sure, the defendant

1 did file an affidavit in support of his motion to dismiss. We do
2 not accept as true the statements in that affidavit. We have not
3 had a chance to take any discovery on it. It may turn out to be
4 true as far as his comings and goings are concerned.

5 However, the allegations of the complaint, even putting
6 that aside, recite that the conditions in Somalia, all of Somalia,
7 including Somaliland, were such that it would be unimaginable to
8 file a complaint such as this even before 1997. I believe Your
9 Honor must take that -- accept that as true for purposes of
10 today's motion.

11 Mr. Drennan has talked a lot about the circumstances in
12 Somalia. We in our moving papers or opposition papers have
13 referred the Court to some reports and the like, but candidly, I
14 don't think the Court is in a position today to make any
15 definitive ruling about any of that. This is, this is essentially
16 argument. Yet Mr. Drennan asks the Court to find as fact what the
17 conditions in Mogadishu are like and how they compare to the
18 conditions in the region of Somaliland. I think we're getting way
19 ahead of ourselves here, Your Honor.

20 THE COURT: Well, I agree with you, this is a motion to
21 dismiss, and the Court must be very deferential to the allegations
22 in the complaint. At the same time, this is a relatively unique
23 kind of complaint for a federal court. It's unique because, A, as
24 I understand it, all of the plaintiffs are still in that area of
25 the world.

1 MR. VIETH: Correct.

2 THE COURT: No. 2, the allegations that are at issue in
3 this case are for conduct that occurred in the 1980s, and so the
4 whole concept behind a statute of limitations is in part to do a
5 balancing of interests. One of the interests, a significant one,
6 is the ability of a defendant to marshal evidence to support a
7 defense, and when charges are that old, for both sides it becomes
8 very difficult to get evidence, and so that's why most causes of
9 action have a statute of limitations.

10 The one in this case is extremely long, that is, the ten
11 years, and then there are these various tolling provisions.

12 I think the most judicious approach to this is to allow
13 some discovery on this issue, in other words, not to definitively
14 resolve the statute of limitations issue. I am concerned among
15 other things about whether or not the two-year hiatus in Canada
16 would properly be something that has to be taken into
17 consideration into whether or not equitable tolling applies here.

18 If it is correct that the defendant lived openly and
19 wasn't hiding, so he could have been found relatively easily, and
20 if, in fact, he was just as amenable to suit in Canada as he is
21 here, I'm not so sure that the equitable tolling would save this
22 case in that it's, what, three months or four months shy of the
23 ten-year limit even giving you all the benefits of the --

24 MR. VIETH: Assuming that affidavit is true, I would
25 agree that two years in Canada would put us over the limit. It is

1 our position that does not count against the statute of
2 limitations for this Court because he could not have been sued in
3 this Court when he was in Canada under any notion of personal
4 jurisdiction.

5 I understand Your Honor may be deferring a ruling on all
6 of this. I just wanted to let the Court know what our position is
7 on it.

8 THE COURT: All right. And, in fact, what I'm going to
9 do, Mr. Drennan, is I'm not granting the motion to dismiss at this
10 point for several reasons, one of which is I do want to find out
11 if the U.S. Department of State is taking any position whatsoever.

12 And, Mr. Vieth, have you heard anything back from them?

13 MR. VIETH: In the other case, I have not, Your Honor,
14 nor in this case.

15 THE COURT: All right, all right. Because I think,
16 obviously, we have to make sure that the executive branch has had
17 an opportunity to express its position given the nature of the
18 issues in this case.

19 I am comfortable, however, in giving you some definitive
20 ruling in the sense that I do not find as a matter of law that
21 this defendant would qualify for head of state immunity. I don't
22 think he does.

23 MR. DRENNAN: We haven't made that argument.

24 THE COURT: All right. Well, I just want to make sure
25 if you -- we thought it was there by inference, and I want to make

1 it clear that I would not find that he would be protected in that
2 respect.

3 What I'm going to do is on the -- again, the issue about
4 exhaustion, again, is too fact bound at this point in my view to
5 be proper. I'm going to deny the motion to dismiss without
6 prejudice to the defendant's ability to raise any of the specific
7 issues in that motion at that time when there is a more fully
8 developed record. I think that's the appropriate way to proceed.

9 The statute of limitations issue, however, is of great
10 concern to the Court because of the length of time, and that one
11 can be renoticed at any time when both sides feel that adequate
12 evidence has been developed in that respect. All right?

13 Thank you.

14 MR. VIETH: Thank you, Your Honor.

15 (Which were all the proceedings
16 had at this time.)

17

18 CERTIFICATE OF THE REPORTER

19 I certify that the foregoing is a correct transcript of the
20 record of proceedings in the above-entitled matter.

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Anneliese J. Thomson